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# S. 2131

To regulate the unauthorized installation of computer software, to require clear disclosure to computer users of certain computer software features that may pose a threat to user privacy, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 26, 2004

Mr. BURNS (for himself, Mr. WYDEN, and Mrs. BOXER) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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# A BILL

To regulate the unauthorized installation of computer software, to require clear disclosure to computer users of certain computer software features that may pose a threat to user privacy, and for other purposes.

1     *Be it enacted by the Senate and House of Representa-*

2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4     This Act may be cited as the "Controlling Invasive

5 and Unauthorized Software Act".

**SEC. 2. UNAUTHORIZED INSTALLATION OF COMPUTER SOFTWARE.**

(a) NOTICE, CHOICE, AND UNINSTALL PROCE-DURES.—It is unlawful for any person who is not the user of a protected computer to install computer software on that computer, or to authorize, permit, or cause the installation of computer software on that computer, unless—

(1) the user of the computer has received notice that satisfies the requirements of section 3;

(2) the user of the computer has granted consent that satisfies the requirements of section 3; and

(3) the computer software's uninstall procedures satisfy the requirements of section 3.

(b) RED HERRING PROHIBITION.—It is unlawful for any person who is not the user of a protected computer to install computer software on that computer, or to authorize, permit, or cause the installation of computer software on that computer, if the design or operation of the computer software is intended, or may reasonably be expected, to confuse or mislead the user of the computer concerning the identity of the person or service responsible for the functions performed or content displayed by such computer software.

**SEC. 3. NOTICE, CONSENT, AND UNINSTALL REQUIRE-**

**MENTS.**

(a) NOTICE.—For purposes of section 2(a)(1), notice to the user of a computer shall—

(1) include a clear notification, displayed on the screen until the user either grants or denies consent to installation, of the name and general nature of the computer software that will be installed if the user grants consent; and

(2) include a separate disclosure, with respect to each information collection, advertising, distributed computing, and settings modification feature contained in the computer software, that—

(A) remains displayed on the screen until the user either grants or denies consent to that feature;

(B) in the case of an information collection feature, provides a clear description of—

(i) the type of personal or network information to be collected and transmitted by the computer software; and

(ii) the purpose for which the personal or network information is to be collected, transmitted, and used;

(C) in the case of an advertising feature, provides—

1            (i) a representative full-size example

2     of each type of advertisement that may be

3     delivered by the computer software;

4            (ii) a clear description of the esti-

5     mated frequency with which each type of

6     advertisement may be delivered; and

7            (iii) a clear description of how the

8     user can distinguish each type of advertise-

9     ment that the computer software delivers

10     from advertisements generated by other

11     software, Internet website operators, or

12     services;

13     (D) in the case of a distributed computing

14 feature, provides a clear description of—

15            (i) the types of information or mes-

16     sages the computer software will cause the

17     computer to transmit;

18            (ii) the estimated frequency with

19     which the computer software will cause the

20     computer to transmit such messages or in-

21     formation;

22            (iii) the estimated volume of such in-

23     formation or messages, and the likely im-

24     pact, if any, on the processing or commu-

1    nications capacity of the user's computer;

2    and

3            (iv) the nature, volume, and likely im-

4        pact on the computer's processing capacity

5        of any computational or processing tasks

6        the computer software will cause the com-

7        puter to perform in order to generate the

8        information or messages the computer

9        software will cause the computer to trans-

10       mit;

11           (E) in the case of a settings modification

12       feature, provides a clear description of the na-

13       ture of the modification, its function, and any

14       collateral effects the modification may produce;

15       and

16           (F) provides a clear description of proce-

17       dures the user may follow to turn off such fea-

18       ture or uninstall the computer software.

19    (b) CONSENT.—For purposes of section 2(a)(2), con-

20  sent requires—

21       (1) consent by the user of the computer to the

22    installation of the computer software; and

23       (2) separate affirmative consent by the user of

24    the computer to each information collection feature,

25    advertising feature, distributed computing feature,

1 and settings modification feature contained in the

2 computer software.

3 (c) UNINSTALL PROCEDURES.—For purposes of sec-

4 tion 2(a)(3), computer software shall—

5 (1) appear in the "Add/Remove Programs"

6 menu or any similar feature, if any, provided by

7 each operating system with which the computer soft-

8 ware functions;

9 (2) be capable of being removed completely

10 using the normal procedures provided by each oper-

11 ating system with which the computer software func-

12 tions for removing computer software; and

13 (3) in the case of computer software with an

14 advertising feature, include an easily identifiable link

15 clearly associated with each advertisement that the

16 software causes to be displayed, such that selection

17 of the link by the user of the computer generates an

18 on-screen window that informs the user about how

19 to turn off the advertising feature or uninstall the

20 computer software.

21 **SEC. 4. UNAUTHORIZED USE OF CERTAIN COMPUTER SOFT-**

22 **WARE.**

23 It is unlawful for any person who is not the user of

24 a protected computer to use an information collection, ad-

25 vertising, distributed computing, or settings modification

1 feature of computer software installed on that computer,

2 if—

3       (1) the computer software was installed in vio-

4    lation of section 2;

5       (2) the use in question falls outside the scope

6    of what was described to the user of the computer

7    in the notice provided pursuant to section 3(a); or

8       (3) in the case of an information collection fea-

9    ture, the person using the feature fails to establish

10    and maintain reasonable procedures to protect the

11    security and integrity of personal information so col-

12    lected.

13 **SEC. 5. EXCEPTIONS.**

14    (a) PREINSTALLED SOFTWARE.—A person who in-

15 stalls, or authorizes, permits, or causes the installation of,

16 computer software on a protected computer before the

17 first retail sale of the computer shall be deemed to be in

18 compliance with this Act if the user of the computer re-

19 ceives notice that would satisfy section 3(a)(2) and grants

20 consent that would satisfy section 3(b)(2) prior to—

21       (1) the initial collection of personal or network

22    information, in the case of any information collection

23    feature contained in the computer software;

1      (2) the initial generation of an advertisement

2     on the computer, in the case of any advertising fea-

3     ture contained in the computer software;

4      (3) the initial transmission of information or

5     messages, in the case of any distributed computing

6     feature contained in the computer software; and

7      (4) the initial modification of user settings, in

8     the case of any settings modification feature.

9     (b) OTHER EXCEPTIONS.—Sections 3(a)(2), 3(b)(2),

10 and 4 do not apply to any feature of computer software

11 that is reasonably needed to—

12      (1) provide capability for general purpose online

13     browsing, electronic mail, or instant messaging, or

14     for any optional function that is directly related to

15     such capability and that the user knowingly chooses

16     to use;

17      (2) determine whether or not the user of the

18     computer is licensed or authorized to use the com-

19     puter software; and

20      (3) provide technical support for the use of the

21     computer software by the user of the computer.

22     (c) PASSIVE TRANSMISSION, HOSTING, OR LINK.—

23 For purposes of this Act, a person shall not be deemed

24 to have installed computer software, or authorized, per-

1 mitted, or caused the installation of computer software,

2 on a computer solely because that person provided—

3     (1) the Internet connection or other trans-

4     mission capability through which the software was

5     delivered to the computer for installation;

6     (2) the storage or hosting, at the direction of

7     another person and without selecting the content to

8     be stored or hosted, of the software or of an Internet

9     website through which the software was made avail-

10     able for installation; or

11     (3) a link or reference to an Internet website

12     the content of which was selected and controlled by

13     another person, and through which the computer

14     software was made available for installation.

15 (d) SOFTWARE RESIDENT IN TEMPORARY MEM-

16 ORY.—In the case of an installation of computer software

17 that falls within the meaning of section 7(10)(B) but not

18 within the meaning of section 7(10)(A), the requirements

19 set forth in subsections (a)(1), (b)(1), and (c) of section

20 3 shall not apply.

21 (e) FEATURES ACTIVATED BY USER OPTIONS.—In

22 the case of an information collection, advertising, distrib-

23 uted computing, or settings modification feature that re-

24 mains inactive or turned off unless the user of the com-

25 puter subsequently selects certain optional settings or

1 functions provided by the computer software, the require-
2 ments of subsections (a)(2) and (b)(2) of section 3 may
3 be satisfied by providing the applicable disclosure and ob-
4 taining the applicable consent at the time the user selects
5 the option that activates the feature, rather than at the
6 time of initial installation.

7 **SEC. 6. ADMINISTRATION AND ENFORCEMENT.**

8 (a) IN GENERAL.—Except as provided in subsection
9 (b), this Act shall be enforced by the Commission as if
10 the violation of this Act were an unfair or deceptive act
11 or practice proscribed under section 18(a)(1)(B) of the
12 Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

13 (b) ENFORCEMENT BY CERTAIN OTHER AGEN-
14 CIES.—Compliance with this Act shall be enforced
15 under—

16 (1) section 8 of the Federal Deposit Insurance
17 Act (12 U.S.C. 1818), in the case of—

18 (A) national banks, and Federal branches
19 and Federal agencies of foreign banks, by the
20 Office of the Comptroller of the Currency;

21 (B) member banks of the Federal Reserve
22 System (other than national banks), branches
23 and agencies of foreign banks (other than Fed-
24 eral branches, Federal agencies, and insured
25 State branches of foreign banks), commercial

1    lending companies owned or controlled by for-

2    eign banks, and organizations operating under

3    section 25 or 25A of the Federal Reserve Act

4    (12 U.S.C. 601 and 611), by the Board; and

5         (C) banks insured by the Federal Deposit

6    Insurance Corporation (other than members of

7    the Federal Reserve System) and insured State

8    branches of foreign banks, by the Board of Di-

9    rectors of the Federal Deposit Insurance Cor-

10   poration;

11   (2) section 8 of the Federal Deposit Insurance

12   Act (12 U.S.C. 1818), by the Director of the Office

13   of Thrift Supervision, in the case of a savings asso-

14   ciation the deposits of which are insured by the Fed-

15   eral Deposit Insurance Corporation;

16   (3) the Federal Credit Union Act (12 U.S.C.

17   1751 et seq.) by the National Credit Union Adminis-

18   tration Board with respect to any Federal credit

19   union;

20   (4) part A of subtitle VII of title 49, United

21   States Code, by the Secretary of Transportation

22   with respect to any air carrier or foreign air carrier

23   subject to that part;

24   (5) the Packers and Stockyards Act, 1921 (7

25   U.S.C. 181 et seq.) (except as provided in section

1  406 of that Act (7 U.S.C. 226, 227)), by the Sec-

2  retary of Agriculture with respect to any activities

3  subject to that Act; and

4      (6) the Farm Credit Act of 1971 (12 U.S.C.

5  2001 et seq.) by the Farm Credit Administration

6  with respect to any Federal land bank, Federal land

7  bank association, Federal intermediate credit bank,

8  or production credit association.

9  (c) EXERCISE OF CERTAIN POWERS.—For the pur-

10 pose of the exercise by any agency referred to in sub-

11 section (b) of its powers under any Act referred to in that

12 subsection, a violation of this Act is deemed to be a viola-

13 tion of a requirement imposed under that Act. In addition

14 to its powers under any provision of law specifically re-

15 ferred to in subsection (b), each of the agencies referred

16 to in that subsection may exercise, for the purpose of en-

17 forcing compliance with any requirement imposed under

18 this Act, any other authority conferred on it by law.

19 (d) ACTIONS BY THE COMMISSION.—The Commis-

20 sion shall prevent any person from violating this Act in

21 the same manner, by the same means, and with the same

22 jurisdiction, powers, and duties as though all applicable

23 terms and provisions of the Federal Trade Commission

24 Act (15 U.S.C. 41 et seq.) were incorporated into and

25 made a part of this Act. Any entity that violates any provi-

1 sion of that section is subject to the penalties and entitled

2 to the privileges and immunities provided in the Federal

3 Trade Commission Act in the same manner, by the same

4 means, and with the same jurisdiction, power, and duties

5 as though all applicable terms and provisions of the Fed-

6 eral Trade Commission Act were incorporated into and

7 made a part of that section.

8 (e) PRESERVATION OF COMMISSION AUTHORITY.—

9 Nothing contained in this section shall be construed to

10 limit the authority of the Commission under any other

11 provision of law.

12 **SEC. 7. ACTIONS BY STATES.**

13 (a) IN GENERAL.—

14 (1) CIVIL ACTIONS.—In any case in which the

15 attorney general of a State has reason to believe

16 that an interest of the residents of that State has

17 been or is threatened or adversely affected by the

18 engagement of any person in a practice that this Act

19 prohibits, the State, as parens patriae, may bring a

20 civil action on behalf of the residents of the State in

21 a district court of the United States of appropriate

22 jurisdiction—

23 (A) to enjoin that practice;

24 (B) to enforce compliance with the rule;

1              (C) to obtain damage, restitution, or other

2      compensation on behalf of residents of the

3      State; or

4              (D) to obtain such other relief as the court

5      may consider to be appropriate.

6      (2) NOTICE.—

7              (A) IN GENERAL.—Before filing an action

8      under paragraph (1), the attorney general of

9      the State involved shall provide to the Commis-

10      sion—

11                 (i) written notice of that action; and

12                 (ii) a copy of the complaint for that

13              action.

14              (B) EXEMPTION.—

15                 (i) IN GENERAL.—Subparagraph (A)

16               shall not apply with respect to the filing of

17               an action by an attorney general of a State

18               under this subsection, if the attorney gen-

19               eral determines that it is not feasible to

20               provide the notice described in that sub-

21              paragraph before the filing of the action.

22                 (ii) NOTIFICATION.—In an action de-

23               scribed in clause (i), the attorney general

24               of a State shall provide notice and a copy

25              of the complaint to the Commission at the

1    same time as the attorney general files the

2    action.

3  (b) INTERVENTION.—

4    (1) IN GENERAL.—On receiving notice under

5  subsection (a)(2), the Commission shall have the

6  right to intervene in the action that is the subject

7  of the notice.

8    (2) EFFECT OF INTERVENTION.—If the Com-

9  mission intervenes in an action under subsection (a),

10  it shall have the right—

11    (A) to be heard with respect to any matter

12    that arises in that action; and

13    (B) to file a petition for appeal.

14  (c) CONSTRUCTION.—For purposes of bringing any

15  civil action under subsection (a), nothing in this subtitle

16  shall be construed to prevent an attorney general of a

17  State from exercising the powers conferred on the attorney

18  general by the laws of that State to—

19    (1) conduct investigations;

20    (2) administer oaths or affirmations; or

21    (3) compel the attendance of witnesses or the

22  production of documentary and other evidence.

23  (d) ACTIONS BY THE COMMISSION.—In any case in

24  which an action is instituted by or on behalf of the Com-

25  mission for violation of section 2 of this Act, no State may,

1 during the pendency of that action, institute an action

2 under subsection (a) against any defendant named in the

3 complaint in that action for violation of that section.

4 (e) VENUE; SERVICE OF PROCESS.—

5 (1) VENUE.—Any action brought under sub-

6 section (a) may be brought in the district court of

7 the United States that meets applicable require-

8 ments relating to venue under section 1391 of title

9 28, United States Code.

10 (2) SERVICE OF PROCESS.—In an action

11 brought under subsection (a), process may be served

12 in any district in which the defendant—

13 (A) is an inhabitant; or

14 (B) may be found.

15 **SEC. 8. DEFINITIONS.**

16 In this Act:

17 (1) ADVERTISEMENT.—The term "advertise-

18 ment" means a commercial promotion for a product

19 or service, but does not include promotions for prod-

20 ucts or services that appear on computer software

21 help or support pages that are displayed in response

22 to a request by the user.

23 (2) ADVERTISING FEATURE.—The term "adver-

24 tising feature" means a function of computer soft-

1 ware that, when installed on a computer, delivers ad-

2 vertisements to the user of that computer.

3 (3) AFFIRMATIVE CONSENT.—The term "af-

4 firmative consent" means consent expressed through

5 action by the user of a computer other than default

6 action specified by the installation sequence and

7 independent from any other consent solicited from

8 the user during the installation process.

9 (4) CLEAR DESCRIPTION.—The term "clear de-

10 scription" means a description that is clear, con-

11 spicuous, concise, and in a font size that is at least

12 as large as the largest default font displayed to the

13 user by the software.

14 (5) COMPUTER SOFTWARE.—The term "com-

15 puter software"—

16 (A) means any program designed to cause

17 a computer to perform a desired function or

18 functions; and

19 (B) does not include any cookie.

20 (6) COOKIE.—The term "cookie" means a text

21 file—

22 (A) that is placed on a computer by an

23 Internet service provider, interactive computer

24 service, or Internet website; and

1          (B) the sole function of which is to record

2          information that can be read or recognized by

3          an Internet service provider, interactive com-

4          puter service, or Internet website when the user

5          of the computer uses or accesses such provider,

6          service, or website.

7     (7) DISTRIBUTED COMPUTING FEATURE.—The

8 term ''distributed computing feature'' means a func-

9 tion of computer software that, when installed on a

10 computer, transmits information or messages, other

11 than personal or network information about the user

12 of the computer, to any other computer without the

13 knowledge or direction of the user and for purposes

14 unrelated to the tasks or functions the user inten-

15 tionally performs using the computer.

16     (8) FIRST RETAIL SALE.—The term ''first retail

17 sale'' means the first sale of a computer, for a pur-

18 pose other than resale, after the manufacture, pro-

19 duction, or importation of the computer. For pur-

20 poses of this paragraph, the lease of a computer

21 shall be considered a sale of the computer at retail.

22     (9) INFORMATION COLLECTION FEATURE.—The

23 term ''information collection feature'' means a func-

24 tion of computer software that, when installed on a

25 computer, collects personal or network information

1 about the user of the computer and transmits such

2 information to any other party on an automatic

3 basis or at the direction of a party other than the

4 user of the computer.

5 (10) INSTALL.—The term ''install'' means—

6 (A) to write computer software to a com-

7 puter's persistent storage medium, such as the

8 computer's hard disk, in such a way that the

9 computer software is retained on the computer

10 after the computer is turned off and subse-

11 quently restarted; or

12 (B) to write computer software to a com-

13 puter's temporary memory, such as random ac-

14 cess memory, in such a way that the software

15 is retained and continues to operate after the

16 user of the computer turns off or exits the

17 Internet service, interactive computer service, or

18 Internet website from which the computer soft-

19 ware was obtained.

20 (11) NETWORK INFORMATION.—The term ''net-

21 work information'' means—

22 (A) an Internet protocol address or domain

23 name of a user's computer;

1  (B) a cookie or other unique identifier of

2  a computer user or a computer user's computer;

3  or

4  (C) a Uniform Resource Locator or other

5  information that identifies Internet websites or

6  other online resources accessed by a user of a

7  computer.

8  (12) PERSONAL INFORMATION.—The term

9  "personal information" means—

10  (A) a first and last name, whether given at

11  birth or adoption, assumed, or legally changed;

12  (B) a home or other physical address in-

13  cluding street name, name of a city or town,

14  and zip code;

15  (C) an electronic mail address or online

16  username;

17  (D) a telephone number;

18  (E) a social security number;

19  (F) any personal identification number;

20  (G) a credit card number, any access code

21  associated with the credit card, or both;

22  (H) a birth date, birth certificate number,

23  or place of birth; or

24  (I) any password or access code.

1     (13) PERSON.—The term "person" has the

2 meaning given that term in section 3(32) of the

3 Communications Act of 1934 (47 U.S.C. 153(32)).

4     (14) PROTECTED COMPUTER.—The term "pro-

5 tected computer" has the meaning given that term

6 in section 1030(e)(2)(B) of title 18, United States

7 Code.

8     (15) SETTINGS MODIFICATION FEATURE.—The

9 term "settings modification feature" means a func-

10 tion of computer software that, when installed on a

11 computer—

12         (A) modifies an existing user setting, with-

13     out direction from the user of the computer,

14     with respect to another computer software ap-

15     plication previously installed on that computer;

16     or

17         (B) enables a user setting with respect to

18     another computer software application pre-

19     viously installed on that computer to be modi-

20     fied in the future without advance notification

21     to and consent from the user of the computer.

22     (16) USER OF A COMPUTER.—The term "user

23 of a computer" means an individual who operates a

24 computer with the authorization of the computer's

25 lawful owner.

1 **SEC. 9. EFFECTIVE DATE.**

2      This Act shall take effect 180 days after the date of

3 enactment of this Act.

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